Filed 2/23/05 Paneles Chapados De Encino v. Seguros Comercial America CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

PANELES CHAPADOS DE ENCINO, S.A. DE C.V., et al., Plaintiffs and Appellants, v. SEGUROS COMERCIAL AMERICA S.A. DE C.V., et al., Defendants and Respondents.	B163811 (Los Angeles County Super. Ct. No. BC212202)

Appeal from a judgment of the Superior Court for the County of Los Angeles, David L. Minning, Judge. Reversed and remanded.

Snipper, Wainer & Markoff and Maurice Wainer for Plaintiffs and Appellants.

Alschuler Grossman Stein & Kahan, Barry Leigh Weissman and Lucia E. Coyoca for Defendant and Respondent Seguros Comercial America S.A. de C.V.

Seyfarth Shaw, Laura Wilson Shelby and Geoffrey S. Long for Defendant and Respondent MacAfee & Edwards, Inc.

Stone, Rosenblatt & Cha, John S. Cha and John B. Yu for Defendants and Respondents Jordan and Associates, Inc. and Rick Jordan.

Paneles Chapados De Encino, S.A. de C.V., A. Joffe Industries of Mexico, S.A. de C.V. and Plycraft Industries, Inc. (collectively Plycraft) appeal the dismissal of their lawsuit for fraud and negligence against the insurers of real property Plycraft owns in Mexico and the insurance agents who represented it in obtaining insurance coverage. Although we affirm the trial court's order sustaining, without leave to amend, the demurrer to Plycraft's cause of action for deceit, the trial court erred in sustaining demurrers to the other causes of action on the ground of forum non conveniens; and its dismissal of the entire action as moot was premature. Accordingly, we reverse the judgment and remand the matter for further proceedings in the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

Plycraft purchased an insurance policy for real property located in Tijuana, Mexico in July 1997. The policy was acquired from Seguros Comercial America S.A. de C.V. (SCA) through insurance agents Jordan & Associates, Inc., Lopez & Viana, MacAfee & Edwards and Rick Jordan (collectively insurance agents).

Plycraft's property was damaged by severe rain storms in February 1998. Plycraft made a claim under the policy; SCA denied coverage for the loss. As a result, Plycraft filed a breach of contract and fraud action against SCA in the United States District Court for the Central District of California. The federal court granted SCA's motion to dismiss the action on the ground of forum non conveniens in April 1999, finding Mexico provided a more appropriate forum for the dispute.

In June 1999 Plycraft filed this action in the superior court against SCA and the insurance agents, alleging fraud and negligence in connection with obtaining and enforcing the insurance policy.[1] Plycraft alleged SCA had wrongfully relied on an

[1] SCA removed the case to federal court, alleging the insurance agents were sham defendants named in the state court action only to destroy diversity jurisdiction. Plycraft's motion to remand to state court was granted in July 2000.

obscure definition of "flood" in its policy and the insurance agents had wrongfully failed to disclose the absence of a separate flood policy that was necessary to provide the full coverage requested by Plycraft. Plycraft instituted an administrative proceeding against SCA in July 2000 and then initiated an insurance coverage action in Mexico on October 31, 2000. The insurance agents are not parties to the Mexican action, which does not include any of the fraud or negligence claims asserted in the superior court action.

On March 1, 2001 the superior court heard argument on SCA's and the insurance agents' motion to dismiss, or in the alternative, stay the action on forum non conveniens grounds. The defendants had also demurred to Plycraft's second amended complaint (the operative pleading). The court granted a stay, ordered the parties to provide regular status reports and granted Plycraft leave to file a third amended complaint, which was to be immediately subject to the stay. The third amended complaint, the subject of this appeal, was filed on March 21, 2001.

The trial court lifted its stay on August 15, 2002 and ordered SCA and the insurance agents to respond to the third amended complaint. SCA demurred and moved to dismiss on the ground of forum non conveniens on September 13, 2002. Both the demurrer and the motion were grounded on the fact the Mexican action was expected to be resolved by September 17, 2002. In its reply papers SCA informed the court that the Mexican trial court had ruled the loss at issue had been caused by a preexisting condition for which there was no coverage. After a hearing at which Plycraft argued the Mexican court's ruling was not yet final, the court sustained the demurrer and dismissed the action with prejudice, ruling (a) the federal court's forum non conveniens analysis was equally applicable to the state court proceedings; (b) the actions of the Mexican court had rendered Plycraft's action moot; and (c) Plycraft's complaint fails to allege a proper cause of action as to any of the defendants.

This court stayed Plycraft's appeal of the trial court's order on June 17, 2003 after the Mexican Supreme Court had vacated the Mexican judgment and returned the matter

to the Mexican trial court for further proceedings. On February 10, 2004 Plycraft's counsel informed this court the Mexican court had ruled SCA is liable for Plycraft's losses to the real property, albeit on grounds other than flood loss. We lifted the stay and directed the parties to brief the issues raised by Plycraft's appeal of the dismissal of its lawsuit. To date, no final judgment has been entered in the Mexican action.

DISCUSSION

1. *Standard of Review*

Although the trial court's attorney-prepared order does not distinguish between SCA's demurrer and its motion to dismiss or stay for forum non conveniens, the order dismissing the action was, in effect, a ruling on both the demurrer and the motion.

a. *Demurrer*

In reviewing an order sustaining a demurrer, we independently review the complaint to determine whether the facts alleged state a cause of action under any possible legal theory. (*Aubry v Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) We must give the complaint a reasonable interpretation, "treat[ing] the demurrer as admitting all material facts properly pleaded." (*Ibid.*) If the plaintiff demonstrates a reasonable possibility the complaint can be cured by amendment, it is an abuse of discretion for the trial court to sustain the demurrer without leave to amend. (*Ibid.*)

b. *Motion to Dismiss for Forum Non Conveniens*

"A court may, in its discretion, choose to refrain from exercising its jurisdiction to hear a case if the case may be more appropriately tried elsewhere. [Citation.] California codified this principle, known as forum non conveniens, in Code of Civil Procedure section 410.30."[2] (*Chong v. Superior Court* (1997) 58 Cal.App.4th 1032, 1036.) In determining whether to grant a motion based on forum non conveniens, the court first

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[2] Code of Civil Procedure section 410.30, subdivision (a), provides: "When a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just."

must determine whether the alternate forum is a suitable place for trial. (*Stangvik v. Shiley Inc.* (1991) 54 Cal.3d 744, 751.) "A forum is suitable if there is jurisdiction and no statute of limitations bar to hearing the case on the merits. [Citation.] '[A] forum is suitable where an action "can be brought," although not necessarily won.' [Citation.]" (*Chong,* at pp. 1036-1037.) This determination is nondiscretionary, and we review it de novo. (*Stangvik,* at p. 751.) If the alternative forum is found suitable, the court then determines whether the parties' interests in the alternative forum outweigh the state's interest in having the dispute adjudicated in California. (*Ibid*.) We review that determination for abuse of discretion. (*Id.* at p. 752, fn. 3.)

2. *Plycraft Has Not Established the Applicability of Insurance Code Section 1616*

Plycraft contends SCA is barred from defending this action by Insurance Code section 1616, which provides, "Before any nonadmitted foreign or alien insurer shall file or cause to be filed any pleading in any action, suit or proceeding instituted against it, the insurer shall either (1) procure a certificate of authority to transact insurance in this state; or (2) give a bond in the action, suit or proceeding in an amount to be fixed by the court sufficient to secure the payment of any final judgment which may be rendered in the action, suit, or proceeding." Plycraft has failed to present any evidence to establish SCA is a nonadmitted insurer or has not procured a certificate or bond. In the absence of such evidence (which would not, in any event, be appropriate in the context of a demurrer), the trial court properly declined to find Insurance Code section 1616 applicable.

3. *The Trial Court Erred in Dismissing the Action on the Ground of Forum Non Conveniens*

The trial court relied upon the doctrine of forum non conveniens as the first ground for its order sustaining the demurrer without leave to amend:[3] "As a result of the

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[3] As noted above, the forum non conveniens issue was raised in SCA's motion to dismiss, which was filed concurrently with its demurrer to the third amended complaint. At some point, both the court and the parties began treating the motion to dismiss and the demurrer as an undifferentiated challenge to Plycraft's right to proceed with the litigation.

United States District Court's Order in *Plycraft Industries, Inc. v. Seguros Comercial America S.A. de C.V.,* United States District Court for the Central District of California, Case No. 98-7252 RAP (BQRx), dismissing Plaintiffs' claims on grounds of *forum non conveniens*, which grounds equally apply to the instant litigation, Plaintiffs' First, Second, Third, and Fourth Causes of Action should be adjudicated, if at all, in Mexico."

All of the parties appear to agree that the insurance agents, who were not defendants in the original federal action dismissed on the ground of forum non conveniens, are not subject to the jurisdiction of the Mexican courts and thus cannot be sued in Mexico by Plycraft. The insurance agents do not assert that the trial court's order dismissing the case should be affirmed on appeal on forum non conveniens grounds, relying instead on the trial court's alternative bases for its ruling. For its part, SCA asserts it is not its burden to demonstrate the insurance agents could be sued in Mexico because they are simply "sham defendants."[4] Contrary to SCA's argument, a party moving to dismiss a case under Code of Civil Procedure section 410.30, subdivision (a), must demonstrate that all defendants are subject to the jurisdiction of the alternative forum: "[A] showing that all defendants could be sued in the alternative forum is 'effectively a precondition for even considering stay or dismissal based on inconvenient forum.' [Citation.]" (*American Cemwood Corp. v. American Home Assurance Co.* (2001) 87 Cal.App.4th 431, 437-438 (*American Cemwood*).)

In *American Cemwood, supra,* 87 Cal.App.4th 431, the plaintiff insured sued five insurers in California to establish coverage and for damages for breach of contract and related tort claims. (*Id.* at p. 434.) Three of the insurers filed suit in Canada, seeking declaratory relief concerning their indemnity and defense obligations. (*Ibid.*) The insurers then moved to dismiss or stay the California action on the ground of forum non

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[4] This is the same argument SCA unsuccessfully advanced following its improper removal of the case to federal court. See footnote 3, above.

conveniens, and the California court ordered the action stayed in favor of the Canadian action. (*Id.* at p. 435.)

On appeal the Court of Appeal explained that under both California and federal law, "'[P]rior to balancing the public and private interests . . . , a court must decide whether another adequate forum is available to hear the case because the doctrine of forum non conveniens presupposes the existence of at least two forums in which *all* defendants are amenable to process.' [Citation.]" (*American Cemwood, supra,* 87 Cal.App.4th at p. 438.) It concluded, "The court's discretion to decline to exercise its authorized jurisdiction over an action for considerations of convenience is limited by the proviso that another forum must be available for the plaintiff's action. A rule permitting a stay or dismissal of an action over which no single alternative court could exercise jurisdiction would force the plaintiff to pursue separate actions in multiple states or countries to obtain complete relief. Such a rule, by encouraging piecemeal litigation and blossoming numbers of actions in multiple jurisdictions, would threaten precisely those considerations of convenience, economy and justice the doctrine was designed to bolster. [Citations.]" (*Id.* at pp. 438-439.) The court therefore reversed the trial court's stay order because the moving defendants had failed to demonstrate that all defendants were subject to jurisdiction in Canada. (*Id.* at p. 440.) Similarly, although there is no dispute that Mexico has jurisdiction over SCA, because there has been no showing that the insurance agents can be sued in Mexico, dismissal for forum non conveniens was erroneous. (*Id.* at pp. 387-389.)

4. *The Trial Court's Mootness Determination Was Premature*

The trial court's second ground for sustaining the demurrer and dismissing the action was its conclusion that the Mexican court's September 30, 2002 order rendered the present action moot: "The resolution of the action in Mexico involving the same parties and causes of action has rendered this action moot. Specifically, by Order issued September 30, 2002 in *Plycraft Industries, Inc., A. Joffe Industries, S.A. de C.V., Paneles Chapados de Encino, S.A. de C.V. v. Seguros Comercial America, S.A. de C.V.*, File

156/2000, the Eighth Civil District Court in the Federal District of Mexico dismissed Plaintiff's claims on the ground that the property damage at issue was a pre-existing condition for which there is no insurance coverage. In the absence of a covered loss, Plaintiffs could not have suffered any damages as a result of any conduct by any of the defendants. Accordingly, Plaintiffs' First, Second, Third and Fourth Causes of Action are dismissed with prejudice."

The September 20, 2002 Mexican court order was subsequently reversed by the Mexican Supreme Court, and the matter remanded to the Mexican trial court. Although proceedings continue, that court has now ruled (in yet another nonfinal decision) SCA is liable to Plycraft for losses it incurred at its Mexican property. In light of these developments, the September 30, 2002 Mexican order finding SCA had no liability based on a preexisting condition no longer constitutes a valid ground for dismissing the case as moot. On remand, if appropriate, the parties may renew their motions to dismiss in light of the then-current state of the Mexican litigation. However, it is not properly our function to analyze in the first instance the impact of new developments in related, foreign litigation.

5. *The First, Second and Third Causes of Action in the Third Amended Complaint State Facts Sufficient to Constitute Causes of Action*

As a third ground for sustaining the demurrer without leave to amend, the trial court ruled, "Each of Plaintiffs' four causes of action fails to state facts sufficient to constitute a cause of action against defendants." The trial court did not state the grounds for this ruling or identify any specific deficiencies in Plycraft's claims as pleaded. From its comments at the hearing on the demurrer, however, it appears the trial court believed Plycraft could not plead or prove it was injured by the alleged misconduct of defendants because the Mexican court had held Plycraft's losses were due to a preexisting condition. Based on our own review of the third amended complaint and considering the Mexican Supreme Court's reversal of the finding of preexisting condition, we conclude Plycraft has adequately pleaded the elements of three of its four causes of action: negligent

misrepresentation (first cause of action); fraud (second cause of action); and negligence (third cause of action).

Under California law a plaintiff claiming fraud is required to plead, with specificity, "(1) a knowingly false representation by the defendant; (2) an intent to deceive or induce reliance; (3) justifiable reliance by the plaintiff; and (4) resulting damages." (*Service by Medallion, Inc. v. Clorox Co.* (1996) 44 Cal.App.4th 1807, 1816.) The elements of negligent misrepresentation are the same, except that the allegation of knowing falsity is replaced by an allegation that the representations were made without reasonable grounds for believing them to be true. (*Gagne v. Bertran* (1954) 43 Cal.2d 481, 487-488.) A plaintiff alleging fraud or negligent misrepresentation must "'show how, when, where, to whom, and by what means the representations are tendered.'" (*Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, 73.)

Although Plycraft's third amended complaint could be clearer and more specific, it adequately alleges insurance agent Jordan represented to Plycraft president Ashley Joffe that he was a specialist in Mexican insurance, that in the event of a dispute Plycraft could sue SCA in the United States and that the policy covered "flood" as that term is commonly used and understood in insurance policies issued in this country. It also adequately alleges, albeit in somewhat conclusory fashion, Plycraft's justifiable reliance on the insurance agents' representations and the resulting damages. Finally, the third amended complaint's allegation that the insurance agents were acting as the agents of SCA is sufficient at the demurrer stage of the litigation. Accordingly, Plycraft has adequately stated causes of action for fraud and negligent representation.

We also find Plycraft's third cause of for negligence is sufficient to withstand a demurrer. SCA's argument to the contrary is premised entirely on its argument the fraud and misrepresentation claims were not adequately pleaded, a contention we have already rejected.

6. *The Trial Court Did Not Abuse Its Discretion in Sustaining the Demurrer to the Fourth Cause of Action Without Leave to Amend*

Plycraft's fourth cause of action for deceit, however, is too vague to state a cause of action. Deceit is a form of fraud, subject to the same rule of specificity in pleading. (See, e.g., *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 637-638 [discussing fraud and deceit as interchangeable].) "In California, fraud must be pled specifically; general and conclusory allegations do not suffice. [Citations.] 'Thus "'the policy of liberal construction of the pleadings . . . will not ordinarily be invoked to sustain a pleading defective in any material respect.'" [Citation.] [¶] This particularity requirement necessitates pleading *facts* which "show how, when, where, to whom, and by what means the representations were tendered."' [Citation.] A plaintiff's burden in asserting a fraud claim against a corporate employer is even greater. In such a case, the plaintiff must 'allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written.' [Citation.]" (*Id.* at p. 645.) The allegation in the fourth cause of action, that "defendants" gave Plycraft "multiple, different policies of insurance [that] were different than the policy issued" is insufficient to meet these strict requirements. There is no description of the "multiple, different policies" or why and how such policies were "false." No facts are pleaded to reveal which defendant gave the policies to Plycraft, or how Plycraft's reliance on the vaguely-described policies could have been reasonable. The demurrer was properly sustained. Because Plycraft does not claim the fourth cause of action could be cured by amendment, the trial court did not abuse its discretion in denying leave to amend.

DISPOSITION

The judgment is reversed. The trial court's order sustaining the demurrer to the fourth cause of action without leave to amend is affirmed; the order sustaining demurrers to the first, second and third causes of action is reversed; and the cause is remanded for further proceedings not inconsistent with this opinion. The parties are to bear their own costs on appeal.

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PERLUSS, P. J.

We concur:

JOHNSON, J.

ZELON, J.